

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

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IM 2004-052

EMS TRANSMISSION 10/07/2004
Instruction Memorandum **No. 2005-003**
Expires: 09/30/2006

To: All Field Officials

From: Director

Subject: Cultural Resources and Tribal Consultation for Fluid Minerals Leasing

Program Area: Cultural Resources, Tribal Consultation, and Fluid Minerals Leasing

Purpose: This Instruction Memorandum (IM) clarifies requirements under the National Historic Preservation Act (NHPA) and E.O. 13007 and provides strategies for consideration of cultural resources, in particular properties of traditional religious or cultural significance to Indian tribes and sacred sites, in connection with the fluid minerals program. It expands the guidance in IM 2004-052 *Assessing Tribal and Cultural Considerations as Required in IM 2003-233, Integration of the Energy Policy and Conservation Act (EPCA) Inventory Results into the Land Use Planning Process*, issued November 24, 2003, to all areas with a potential for fluid minerals leasing and development.

Background: Implementation of the fluid minerals program is a tiered process, including land use planning, lease issuance, and permit processing.

The Resource Management Plan (RMP) or planning tier, determines where and under what conditions oil, gas exploration/development activities will be permitted. These plans identify areas suitable for lease and lease constraints, including stipulations to be attached to parcels at the time of lease sale.

Prior to a lease sale, the Field Office and/or State Offices verify that the sale conforms to the RMP (or other planning document) and documents the adequacy of National Environmental Policy Act (NEPA) analysis contained in the Environmental Impact Statement (EIS) prepared with the RMP and

compliance with other applicable laws, regulations and policies, including the NHPA. The purchaser of a lease is entitled to develop his parcel consistent with lease stipulations, but must have an approved Application for Permit to Drill (APD), including a plan of operations, before ground disturbing activities can begin.

Policy and Action:

Stage 1 – Resource Management Plan (RMP):

Allocation decisions for oil and gas do not grant any rights or authorize any activities. The BLM complies with the requirements of section 106 of the NHPA for implementation decisions in the RMPs, including those associated with oil and gas, in accordance with the BLM State protocols under the BLM national Programmatic Agreement. The RMP is the stage at which decisions are made concerning which areas are open or closed to leasing and what stipulations would be applied at lease issuance. Because of the scale and sensitivity of some properties of traditional cultural and religious importance to tribes and sacred sites under E.O.13007, this is the appropriate stage at which to initiate consultation with tribes regarding concerns that may conflict with one or more of the other land uses under consideration.

The BLM must inform tribal officials of opportunities to comment on and participate in development of the BLM land use plans and request their views.

Communication with the tribe should at a minimum provide the tribe with a description and map of the planning effort, invite the tribe to participate in scoping, and request the tribe's comments on: (1) issues or concerns the tribe might have regarding the BLM's management of the planning area; and (2) whether there are any places of traditional religious or cultural importance to the tribe within the planning area, or a need for access to these places that should be considered in the BLM's planning effort. The tribes may recommend the BLM conduct additional contact with traditional leaders. The BLM should attempt to honor those requests.

The appropriate manager should extend an invitation to the governing authority of each tribe potentially concerned about or affected by a plan, seeking the tribe's participation and comments. If the tribe chooses not to participate or provide comments, the manager's efforts will be considered sufficient. If tribal officials request it, the manager should meet with them or other tribal members in person. These few steps are the minimum level of effort sufficient to meet tribal consultation requirements on land use plans.

All consultation efforts should be carefully documented, including specific requests for consultation. If acceptable to tribal officials, a memorandum of understanding endorsed by the Field Office manager and the appropriate tribal official can be used as a tool in conducting and documenting consultation.

The manager must consider comments provided by the tribal governments consulted, together with information on historic resources in general, in making decisions on the plan, including decisions on areas to be made available for leasing and recommended leasing constraints, and must notify the consulted tribes of the relevant final plan decisions.

Additional guidance may also be found in the BLM Manual 8130 and 8120 and Handbook H-8120-1. States are required to coordinate any supplementary guidance with WO-200 and WO-300 before it is issued.

Stage 2 – Leasing of Oil and Gas Parcels.

The issuance of a lease is an “undertaking” as defined by the NHPA. A lease does not authorize specific on-the-ground activities, and no ground disturbance can occur without further authorization from the BLM and the surface management agency, but, unless proscribed by stipulation, lessees can expect to drill somewhere on a lease unless precluded by law. A lessee must have an approved Application for Permit to Drill before any ground disturbing activities can begin

A. Proposed leases where consultation was insufficient during the RMP

Where there has not been sufficient consultation with tribes at or since the RMP stage, the decision maker shall attach the following stipulation to the lease to ensure future lessees are informed that the BLM has not completed its NHPA and other consultation requirements for the lease and that the results of these consultations may effect potential development.

“This lease may be found to contain historic properties and/or resources protected under the National Historic Preservation Act (NHPA), American Indian Religious Freedom Act, Native American Graves Protection and Repatriation Act, E.O. 13007, or other statutes and executive orders. The BLM will not approve any ground disturbing activities that may affect any such properties or resources until it completes its obligations under applicable requirements of the NHPA and other authorities. The BLM may require modification to exploration or development proposals to protect such properties, or disapprove any activity that is likely to result in adverse effects that cannot be successfully avoided, minimized or mitigated.”

B. Proposed leasing where consultation was sufficient at the time of the RMP or has occurred programmatically as described below.

If a decision maker determines that consultation has been sufficient and documents this in the Determination of the NEPA Adequacy statement, no further tribal consultation is required prior to the lease sale.

Stage 3 – Application for Permit to Drill (APD)

After approving an APD is an “undertaking” as defined by the NHPA. The resulting impacts could potentially affect cultural or historical properties. Consultation for the APDs is to be made on a case-by-case basis where there is reasonable indication of tribal concerns in the area in question based on previous correspondence or discussions with tribal governments, published ethnographic studies, or other credible known information.

Programmatic Consultation

The State Offices are directed to take the lead in initiating programmatic consultation with Indian tribes in planning areas not already addressed in IM 2004-052, where past consultation has been insufficient and where there is a potential for future oil and gas leasing and development.

Since this is government-to-government consultation and may overlap Field Office administrative boundaries, it may be more appropriate that a State Director (Associate or Deputy) take the lead in conducting the required consultation.

Time Frame: This instruction is effective immediately. The State Directors are to initiate their programmatic consultation with tribes in an expeditions manner and inform the Director of their progress one year from date of issuance of this IM.

Manual/Handbook Sections Affected: None

Energy Impact: This policy as stated would have limited energy impacts.

Coordination: This IM was coordinated with the Fluid Minerals Group, the Planning Group and the Solicitor’s Office.

Contact: Please direct questions regarding this IM to the Deputy Preservation Officers in your State or to Robin Burgess, Preservation Officer, WO-240, at (202) 785-6581, or Robin_Burgess@blm.gov; Jerry Cordova, Tribal Coordinator, WO-240, at (202) 452-7756, or Jerry_Cordova@blm.gov, or Tom Hare, Physical Scientist, WO-310, at (202) 452-5182, or Tom_Hare@blm.gov.

Signed by:
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